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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT CARL COHEN AND HELENE KONIDARD COHEN, PETITIONERS

v.

WILLIAM FRENCH SMITH IN HIS CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In a case arising under the Freedom of Information Act's law enforcement records exemption, 5 U.S.C. section 552(b)(7), is the government entitled to summary judgment if plaintiffs have controverted agency affiant claims of law enforcement purpose with evidence demonstrating that the records in question were actually compiled for purposes related to a politically motivated inquiry into the requesting parties' constitutionally protected activities?

2. Is the government entitled to rely upon Freedom of Information Act exemption (b)(7)(D) despite the absence of any indication that the confidential source in question is currently alive?

3. Does Freedom of Information Act exemption (b)(6), which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privay[,]" apply to C.I.A. and State Department files containing information about the philosophies, associations, political beliefs and reported statutory or administrative violations of third parties?

4. Were affidavits presented by the government sufficient to justify summary judgment in its favor of claims predicated upon Freedom of Information Act exemption (b)(1) given (a) the agencies' reliance upon conclusory and boilerplate claims of classifiability and (b) the district court's refusal to conduct an *in camera* examination of the documents' contents?

5. Did the district court abuse its discretion by declining to permit plaintiffs through new counsel to rescind an unauthorized stipulation into which their former lawyer had entered dismissing all named federal agency directors as individually liable defendants in a damages claim given the fact that this unauthorized

stipulation created the basis for governmental arguments accepted by the court that the post stipulation damages claim was barred by sovereign immunity, thus rendering the stipulation functionally equivalent to an untra vires settlement of plaintiffs' damages claim?

6. Did the district court abuse its discretion by denying plaintiffs' motion for leave to file an amended complaint given the absence of any prejudice claims from defendants and given plaintiffs' inability to even state a basis for recovery of damages without such amendment?

7. Are clients bound by their former counsel's failure to conduct discovery if that failure is not even discovered by the plaintiff litigants until subsequent to former counsel's discharge and the court's discovery cut-off date? Did the district court abuse its discretion by denying a motion filed by plaintiffs through new counsel for leave to reopen discovery under such circumstances?[1]

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[1]The parties to this litigation are as follows: Plaintiffs are listed in the petition's caption as Petitioners. Respondent William French Smith, who is named in the Petition, entered the case as a defendant by succession as Attorney General. The complaint listed the following defendants, who were sued both individually and in their respective representative capacities: GRIFFIN BELL, in his capacity as Attorney General of the United States; BENJAMIN F. BAILAR, in his capacity as The Postmaster General; HAROLD BROWN, in his capacity as Secretary of Defense; CYRUS VANCE, in his capacity as Secretary of State; W. MICHAEL BLUMENTHAL, in his capacity as Secretary of the Treasury; CLIFFORD ALEXANDER, in his capacity as Secretary of the Army, ADM. STANFIELD TURNER, in his capacity as Director of the Central Intelligence Agency; CLARENCE M. KELLY, in his capacity as Director of the Federal Bureau of Investigation; H. STEWART KNIGHT, in his capacity as Director of the Secret Service; LT. GEN. LEW ALLEN, in his capacity as Director of the National Security Agency; JEROME KURTZ, in his capacity as Director of the Internal Revenue Service. A number of other originally nam-

ed defendants were not parties to proceedings before the Court of Appeals. The only additional defendant before the Court of Appeals was EDWARD W. CARTER, member of the University of California Board of Regents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

ROBERT CARL COHEN AND HELENE KONIDARD COHEN, PETITIONERS

v.

WILLIAM FRENCH SMITH IN HIS CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners hereby petition for a writ of certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is attached hereto as Appendix A. The district court's unreported Order of August 6, 1979 appears as Appen-

dix C to this Petition. The district court's unreported minute order of October 1, 1979 appears as Appendix D to this Petition. The district court's unreported Findings of fact and Conclusions of law appear as Appendix E to this Petition, and its unreported Judgment entered on June 4, 1980 constitutes Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1983, and a timely petition for rehearing was denied by order dated July 5, 1983. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. section 552, and Rule 15(a), Federal Rules of Civil Procedure, are involved in this Petition and appear reproduced, in pertinent part, in Appendix G to this Petition.

STATEMENT OF THE CASE

On September 15, 1977, Plaintiffs commenced this action before the district court, seeking relief under the Freedom of Information and Privacy Acts in their third claim for relief along with damages in their first claim arising in connection with a conspiracy to violate their federal civil and constitutional rights. (1)[1] Jurisdiction for plaintiffs' damages claim was predicated upon 42 U.S.C. section 1983 and 1985 along with the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

[1]Numbers appearing in parentheses correspond with document control numbers by which documents are identified in the Excerpt of Record on Appeal filed with the Court of Appeal below.

Pursuant to a stipulation executed by Plaintiffs' former counsel, the district court dismissed all named federal agency directors as individually liable defendants, leaving them in the case as defendants liable in their respective representative capacities. (45). The government promptly moved for Judgment on the Pleadings as to the damages claim in reliance upon that stipulation, theorizing that this claim was now barred by sovereign immunity. (47, 48). The government's motion was granted. (56, 57).

Plaintiffs' former counsel, having failed to conduct any discovery prior to the discovery cut off date, unsuccessfully sought an extension thereof from the court. (58, 59). Counsel then "settled" the case, and the action was dismissed on April 17, 1979. (60).

Meanwhile, Plaintiffs retained new counsel in May of 1979, (61) and moved to vacate the purported "settlement" agreement into which former counsel had entered, pointing out that they only learned about this agreement following new counsel's retention and had never authorized its execution. (62). At the same time, plaintiffs moved for a reopening of discovery and asserted that only following new counsel's entry had they learned of its non-occurrence. (62). The district court granted the former motion but denied the latter. (65; Appendix C).

Plaintiffs then sought leave to amend their complaint, attempting to allege additional overt acts, to reinstate defendants whose individual liability had been eliminated by former counsel's stipulation and to add certain new defendants. (66). Plaintiffs also moved for withdrawal of former counsel's stipulation, indicating that their knowledge of its execution post-dated new counsel's retention and that the court's reliance upon this stipulation in granting the government's motion for judgment on the pleadings rendered it tantamount to an ultra vires disposition of their damages claim. (73, 75). Additional

ly, plaintiffs moved for reconsideration of the court's order denying their motions for reopening of discovery and for leave to file an amended complaint. (71, 74). In opposition, the government did not claim that prejudice would arise from leave to amend. (76, 77). These motions were denied, however. (Appendix C & D).

The government then moved for summary judgment with respect to Plaintiffs' third claim for relief, claiming it had not violated any provision of the Freedom of Information Act or the Privacy Act. (88, 89). Plaintiffs responded that the government had failed to provide them with information concerning the total number of documents identifiable with plaintiffs that were maintained by federal agencies and pointed out that materials already released established the existence of additional records not revealed by agency affidavits. (109, 118, 119, 121). By this means, Plaintiffs attempted to raise a triable issue of material fact concerning compliance with the district court's order requiring an itemization and indexing of documents pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). (81; Appendix D). Ultimately, plaintiffs argued that evidence of improper withholding by defendant agencies foreclosed summary judgment in their favor.

Plaintiffs also advanced various objections to governmental exemption claims which were litigated on appeal and which will be discussed in detail below. All of these arguments were rejected by the district court, which granted the government's motion in its entirety. (125, 126; Appendices E and F).

The judgment below was affirmed in all respects by the Court of Appeal on March 25, 1983, (Appendix A), and a Petition for Rehearing and Rehearing En Banc was denied by order dated July 5, 1983, (Appendix B).

REASONS FOR GRANTING THE WRIT

This case presents several unsettled important questions for review.

1. Paramount among them is the question of whether in a case involving the Freedom of Information Act's law enforcement records exemption, the government is entitled to summary judgment despite plaintiffs' presentation of evidence indicating that the records in question were compiled not for law enforcement purposes but rather for purposes related to official interest in Constitutionally protected activities.

In opposing the government's summary judgment motion, Plaintiffs adduced substantial evidence tending to demonstrate that the investigations to which they were subjected by numerous federal agencies, especially the F.B.I. and the Army, were politically inspired attempts to gather information concerning their Constitutionally protected activities and associations. Plaintiffs also maintained that this information was gathered in order to facilitate massive interference with Robert Cohen's activities as a writer and film maker by the F.B.I. and C.I.A., interference which formed the core of their damages claim and which, according to Plaintiffs, established that the sustained and massive investigations to which they were subjected for two decades were not inspired by "law enforcement" as opposed to political purposes. (109; 62, attached exhibits).

The Court of Appeal disposed of this issue by reasoning that affidavits presented by the F.B.I. and Army disclosed that F.B.I. documents identifiable with plaintiffs were "compiled in investigations into possible violations by Cohen of federal anti-rebellion and sedition laws, and the Army deleted information related to national security investigations." While this formulation certainly states the government's claims with accuracy, Plain-

evidence of outright interference with Robert Cohen's artistic endeavors by federal operatives and the intense interest displayed by such agents in Plaintiffs' political associations suggests other purposes as having inspired compilation of at least some records at issue in this case. The Court of Appeals' resolution of this issue nevertheless suggests that the government is entitled to summary judgment of exemption (b)(7) disputes once it has made evidentiary claims that the records in question were "compiled for law enforcement purposes" regardless of whether requesting parties adduce evidentiary support for a challenge to official assertions of reliance upon such purposes.

This approach to the problem seems at variance with the language chosen by Congress for exemption (b)(7). Congressional intent to guarantee that the existence of actual law enforcement purposes represents a prerequisite to this exemption's availability is clear from the absence of any language entitling agencies to claim its benefits simply on the strength of their jurisdiction to conduct criminal or national security investigations. Purpose, in other words, constitutes a triable issue of material fact the contested character of which would seem to eliminate summary adjudication's propriety.

In fact, this question has generated conflicting resolutions among the circuits.

One approach, followed by the First and Eighth Circuits, accords criminal investigatory agencies such as the F.B.I. a blanket claim of entitlement to exemption (b)(7) without regard to any showing of legitimate law enforcement purpose. (*Irons v. Bell*, 596 F.2d 468, 474 [1st Cir. 1979]; *Kuehnert v. F.B.I.*, 620 F.2d 662, 665-666 [8th Cir. 1980]). Such a rule entitles the F.B.I. to the benefits of a conclusive presumption that all records produced by its agents' activities are compiled "for law enforcement purposes".

A second approach is exemplified by the Ninth Circuit's opinion in *Church of Scientology v. U.S. Department of Justice*, 611 F.2d 738 (9th Cir. 1979), the sole case cited by the Court of Appeals below. According to the Ninth Circuit's test, only agencies having "mixed function[s], encompassing both administrative and law enforcement functions, must demonstrate that [they] had a purpose falling within [their] sphere[s] of enforcement authority in compiling the particular documents." (id., 748). "An agency which has a clear law enforcement mandate, such as the F.B.I., need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed." (id.). While the meaning of this nexus test is far from self-evident, it is clear that an actual showing that the records in question have been "compiled for law enforcement purposes" is unnecessary if the originating agency is the F.B.I. The Ninth Circuit expressly cited *Irons v. Bell*, supra, in the passage setting forth this distinction between "mixed function" and law enforcement agencies.

Yet a third approach has been formulated by the District of Columbia Circuit. In *Pratt v. Webster*, 673 F.2d 408, (D.C. Cir. 1981), the Court of Appeals expressly rejected the First Circuit approach, embraced the Ninth Circuit's distinction between mixed function and law enforcement agencies but held that law enforcement purpose must be demonstrated even if the agency claiming this exemption's benefits falls within the latter category. (i.d., 414, 416, 420). The Court then postulates a "nexus" test and held that to establish compliance with its terms, "the [law enforcement] agency should be able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law." (id., 420). The agency should also establish that its information demonstrating this

nexus stems from a colorably reliable source. (id., 421). It is unclear whether this test admits to rebuttal by plaintiffs, however, or whether an agency is entitled to prevail once this "nexus" is prima facie established. In *Pratt*, the Court upheld the exempt status of F.B.I. files generated in connection with the Bureau's Counterintelligence Program against the Black Panther Party notwithstanding the many improper activities undertaken by operatives associated with COINTELPRO generally because the prevention of violence represented a "significant aspect" of its 'overall purpose" (id., 423) and because the records concerning Mr. Pratt, a Black Panther Party leader, detailed information about specific statutory violations of which he was suspected. (id). Records in the present case contain no such information, however, and appear to reflect an investigation inspired by nothing more than the content of Robert Cohen's films about East Germany, China, Cuba and the House Un-American Activities Committee. The *Pratt* approach, which, in contrast to the Ninth Circuit *Scientology v. Department of Justice* test, requires an actual showing of law enforcement purpose, would not support summary judgment for the government in the present case. An interpretation of exemption (b)(7) which requires a careful analysis of the purpose for which records were compiled would, moreover, allow courts to distinguish between proper investigations and those which, while initially legitimate and undertaken in good faith, "at some point [stray] beyond [their] initial lawful scope and [assume] the nature of a campaign to harass and attempt to discredit" a target. (*Lesar v. United States Department of Justice*, 636 F.2d 472, 487 [D.C. Cir. 1980], discussing F.B.I. files associated with Reverand Martin Luther King, Jr.)

The circuits have thusfar evidenced the emergence of three distinct approaches to this question, and it is

unclear whether the most disclosure-oriented test admits to rebuttal of a prima facie agency showing by requesting parties. The need for clarification in this important Information law area is obvious.

Nor is any light shed upon the question by this Court's recent opinion in *Federal Bureau of Investigation v. Abramson*, ___ U.S. ___, 102 S.Ct. 2054 (1982), which simply addressed the question of "whether information contained in records compiled for law enforcement purposes loses that exempt status when it is incorporated into records compiled for purposes other than law enforcement." (id., 2057). Left undecided by *Abramson* is the initial question of how controversies concerning the existence or absence of such law enforcement purposes are to be resolved. This case presents an opportunity to address precisely that question, thereby resolving a clear conflict among the circuits.

2. A second question presented by this case involves FOIA exemption (b)(7)(D), which protects the identities of confidential sources providing information documented by investigatory records compiled for law enforcement purposes. As plaintiffs pointed out below, the government offered no evidence as to whether the sources which it assertedly sought to protect were even alive or currently viable at the time during which this exemption was asserted. The Court of Appeals dismissed Petitioners' objections in this regard by noting that "[o]ne apparent purpose of exemption (b)(7)(D) is to encourage people to provide information to the government [and that s]uch encouragement is enhanced if individual sources know that their names will remain confidential even after their deaths, thereby protecting family and associates." However, the Court of Appeal cited no authority for its interpretation of this exemption, and the question presented by Petitioners does not appear to have been addressed before. Some light on this issue

is shed by this Court's recent *Abramson* opinion, in which it was noted that Exemption 7 "was intended to prevent premature disclosure of investigatory materials which might be used in a law enforcement action." (id., 2059). Such a purpose is not served by withholding information on the ground that its disclosure would facilitate the identification of persons who are no longer alive and who provided data about activities so remote as to be well beyond any conceivable limitations period. Much of the material which the government sought to protect stems from investigations undertaken nearly twenty years prior to this litigation's commencement. Moreover, it is axiomatic that privacy and reputation interests do not survive beyond death. If Congress had wished this exemption to be interpreted in a manner at variance with this well-established principle, it could certainly have so indicated.

3. A third question presented by this case involves FOIA exemption (b)(6), which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *U.S. Department of State v. Washington Post Company*, 456 U.S. 595 (1982), this Court held that a passport file qualifies as a "similar file" as this phrase appears in exemption (b)(6)'s text. In the present case, this exemption was invoked by the C.I.A. in order to prevent the disclosure of information relevant to third parties' "political philosophies, beliefs and associations, their travels. . .and their personal and confidential relationships." (89, p. 15). The State Department invoked this exemption in order to protect disclosure of information about third parties' contravention of statutes and regulations. (id.) The Court of Appeals concluded that *Washington Post* entitled the government to invoke this exemption despite the fact that shielded material was not contained within a per-

sonnel or medical file. At issue in this case is the outer boundary of exemption (b)(6)'s similar files requirements. *Washington Post* affirmed this Court's conclusion in *Department of Air Force v. Rose*, 425 U.S. 352 (1976), that a file system's similarity to personnel or medical records depends upon the question of whether the information it contains is "the kind of confidential personal data usually included in a personnel file." (id., 372). *Washington Post* simply stands for the proposition that information found in a passport file so qualifies. Data about political philosophies, relations, travels, associations and suspected statutory or regulatory violations is simply not "the kind of confidential personal data usually included in a personnel file." The Court of Appeals' interpretation in *Washington Post* thus appears unwarranted. Information about the citizenship status of third parties, which was found to render the files within which it was contained "similar" for (b)(6) purposes in *Washington Post*, is quite precisely what can be expected to appear in personnel files.

The Court of Appeals' resolution of this controversy was based upon its conclusion that *Washington Post* demonstrates this exemption's similar files requirement "has a broad meaning." Just how broad a meaning should be accorded this component of (b)(6) is a matter of dispute which only this Court can resolve.

4. Yet another reason for granting this Petition involves exemption (b)(1) of the Freedom of Information Act, which exempts properly classified information. A host of circuit court decisions have held that agencies seeking to invoke this exemption's benefits must provide a maximally explicit public justification for their classification claims and must publically explain their inability to provide a more explicit justification in terms that are not simply conclusory. Moreover, agency affidavits are not sufficient if their "claims are conclusory,

merely reciting statutory standards, or if they are too vague or sweeping." (*Hayden v. National Security Agency*, 608 F.2d 1381, 1385 (D.C. Cir. 1979). See also *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 831-833 (D.C. Cir. 1979); *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1292-1294 (D.C. Cir. 1980); *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Case law at the circuit level also indicates that at the very least, summary judgment cannot be upheld absent in camera review if the government has presented legally inadequate affidavits. As pointed out by Petitioners below, however, the government's affidavits offered in order to establish this exemption's availability are no more adequate than those condemned in *Founding Church of Scientology*, supra, and *Allen v. C.I.A.*, supra. Moreover, the district court ignored Plaintiffs' request for an in camera inspection of all purportedly exempt materials.

The problem is that this Court has yet to itself establish precise procedures and standards for resolution of (b)(1) exemption claims. Many cases contain language indicating that governmental classification claims presented in agency affidavits are entitled to substantial weight. (See *Lesar*, supra, 481). The tention between cases emphasizing judicial deference to governmental classification decisions and Congressional insistance upon their validity's independent de novo judicial evaluation is reflected in decisions at the circuit level and calls for resolution by the Supreme Court.[2]

5. Remaining issues presented by this case center around this Court's formulation in *Link v. Wabash Railroad*, 370 U.S. 626, that a party who "voluntarily choose[s as] an attorney as his representative . . . cannot [later] avoid the consequences of the acts or omissions of this freely selected agent." (id., 633-634). As Peti-

[2] This extra discussion is also applicable to exemption (b)(3).

tioners urged below, plaintiffs' former counsel stipulated to the dismissal of all named federal agency heads as individually liable defendants, leaving their damages claim open for dismissal based upon a governmental sovereign immunity theory. That counsel's action effectively terminated Plaintiffs' damages claim is not denied by the Court of Appeal. Nor is the fact that his acts in this regard were ultra vires and not supported by any prior client knowledge or approval. The Court of Appeal's interpretation of this Court's decision in *Link* would saddle litigants with all consequences generated even by ultra vires actions of their attorneys, including those involving compromise, settlement or dismissal of actions without client consent. This interpretation of *Link* is not warranted by that case's facts, however, and is contrary to intervening circuit court authority. In *Link*, supra, this Court simply upheld the power of trial courts to dismiss lawsuits after having rejected the viability of an attorney's justification for failure to undertake the case's diligent prosecution. Authority to effect an ultra vires disposition of a case was not conferred upon counsel by *Link*. Moreover, the Court of Appeals inexplicably ignored a post-*Link* Ninth Circuit decision specifically holding that counsel may not effect settlement of their clients' cases without authorization and approval. (*Harrop v. Western Airlines*, 550 F.2d 1143 [9th Cir. 1977]). The need for clarification of *Link*'s limits is obvious.

Closely related is the question of whether the district court was entitled to deny a plaintiffs' motion for reopening of discovery following new counsel's entry into the case. The Court of Appeal simply concluded that plaintiffs knew that their former lawyer was hesitant to proceed with this case long before the discovery cut-off date. The record is uncontradicted, however, that plaintiffs had no idea that discovery had been, or would not be, undertaken until subsequent to that date. Any finding

that plaintiffs themselves are somehow accountable for discovery's non-occurrence under these circumstances is simply unwarranted, therefore. Here again, this case's record thus clearly presents an opportunity to delimit counsel's authority to effectively bind clients through ultra vires actions.

Related to the *Link* issue is the question of whether leave to amend a complaint may be denied even absent a claim that prejudice will attend such relief. A negative answer is suggested by *Foman v. Davis*, 371 U.S. 178 (1962). In this case, the Court of Appeals claimed that denial of Plaintiffs' motion for leave to amend their complaint was justified as a simple effectuation of prior rulings that vitiated their damages claim. But if the stipulation that generated that claim's dismissal was ultra vires in charcter, as indicate by the uncontradicted record, than a denial of leave to amend collides with Rule 15's requirement that leave "shall be freely given when justice so requires," especially given the absence of any prejudice claims from defendants. Here again, therefore the *Link* doctrine's outer limits require clarification by this Court.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that this Petition should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

No. 81-5365

D.C. No. CV 77-3449 MML

ROBERT CARL COHEN AND HELENE KONIDARE COHEN, PLAINTIFFS/APPELLANTS

v.

WILLIAM FRENCH SMITH, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS/APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
MALCOLM M. LUCAS, DISTRICT JUDGE, PRESIDING

Argued and Submitted . November 4, 1982
Decided . March 25, 1983

Before: GOODWIN, HUG, and BOOCHEVER, Curcuit Judges.

Appellants Robert and Helene Cohen brought suit against numerous federal and state officials for allegedly conspiring to disrupt the livelihood of Robert Cohen in violation of 42 U.S.C. §§ 1983 and 1985 (Supp. 1980). The complaint also alleged that federal defendants unlawfully withheld documents from appellants in violation of the Freedom of Information Act, 5 U.S.C. § 552 (1976 and Supp. 1982)(FOIA), and the Privacy Act, 5 U.S.C. § 552a (1976). The district court granted partial summary judgment for the government on the FOIA and Privacy Act claims.[1] The balance of the action was dismissed. We affirm.

FOIA EXEMPTIONS

The FOIA contains a number of exemptions under which an agency may withhold portions of or whole documents. The burden is on the government agency to establish that a given document is exempt from disclosure. *Church of Scientology v. United States Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1979). In meeting its burden, the government may not rely upon "'conclusory and generalized allegations of exemptions . . .'" but it need not specify its objections in

[1] Before the hearing on the motion for summary judgment, but after the briefing period ended, plaintiffs submitted additional memoranda in opposition to defendants' motion. The court struck the memoranda as untimely.

In their timely opposition to the motion for summary judgment, the Cohens raised specific challenges only to one FOIA exemption used by defendants to withold information. They raised objections to other exemptions in the two stricken memoranda. They now argue the district court abused its discretion by striking the supplemental memoranda. Since the district court discussed each exemption raised in defendants' summary judgment motion, we need not reach the Cohens' contention. We address each FOIA exemption challenged on appeal.

detail that would compromise the secrecy of the undisclosed information. *Id.* (citation omitted).

In camera inspection of withheld documents is not always required. Agency affidavits will be sufficient to justify summary judgment without *in camera* inspection when they show, with reasonable specificity, why the documents fall within the exception. *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 845 (D.C. Cir. 1980), *vacated on other grounds*, 102 S. Ct. 1626 (1982).

EXEMPTION (b)(7)(D)

Appellants raise three specific challenges to the use of exemption (b)(7)(D), which permits withholding of law enforcement investigatory records to the extent that production of such records would disclose the identity of a confidential source. First, appellants contend that the government's invocation of exemption (b)(7)(D) itself raises a question of material fact as to whether the sources were assured confidentiality, thus precluding summary judgment. Second, the Cohens contend that the government has not proven that the information was gathered in the course of a lawful investigation. Third, appellants contend that in order to invoke the exemption, the agencies must prove that their confidential sources are still alive.

Appellants' first contention does not defeat summary judgment. We note that courts "have denied disclosure of the names of interviewees and other sources where it was apparent that the agency's 'investigatory function depends for its existance upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known.'" *See Lamont v. Department of Justice*, 475 F. Supp. 761, 779

(S.D.N.Y. 1979) and cases cited therein.

The court in *Lamont* granted partial summary judgment to the Department of Justice as to the Department's deletion of names of confidential informants because the names were omitted in circumstances from which confidentiality could reasonably be inferred, "that is, in the course of an investigation that must have appeared highly serious and sensitive to the persons interviewed." *Id.* The documents here include reports on Cohen's activities from 1957 and earlier. Investigations of Cohen included inquiry into trips he made to China in 1957 and Cuba in 1963. Those inquiries must have appeared "highly serious and sensitive" to interviewees. Furthermore, some of the deletions were properly made under other exemptions.

As to the Cohens' second contention, the agencies have demonstrated the information was obtained in the course of lawful investigations. Because of its explicit law enforcement mandate, the FBI need establish only that withholding the information has a "rational nexus" with enforcement of a federal law. *Church of Scientology*, 611 F.2d at 748. That standard was met. FBI documents were compiled in investigations into possible violations by Cohen of federal anti-rebellion and sedition laws, and the Army deleted information related to national security investigations.

Appellants' third argument is that the agencies must prove that the confidential source is still alive. The exemption contains no such requirement. One apparent purpose of exemption (b)(7)(D) is to encourage people to provide information to the government. Such encouragement is enhanced if individual sources know that their names will remain confidential even after their deaths, thereby protecting family and associates. The exemption was properly applied.

EXEMPTION (b)(1)

This exemption was invoked to withhold information classified under Executive Order 12065. Appellants argue that appellees fail to show that the withheld material was properly classified under Executive Order 12065. They did not give any specific examples to support their argument. On the other hand, agency affidavits give detailed descriptions of what was withheld and why. The affidavits justify continued classification despite the age of some of the documents. The court must accord the affidavits "substantial weight." *Lesar v. United States Department of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980). The exemption was properly applied.

EXEMPTION (b)(2)

The State Department invoked this exemption to delete administrative material, such as routing notations. The FBI exempted from disclosure informant symbol numbers and other information which could identify a source.

Appellants argue this information is not related to internal personnel rules and practices. In *Lesar*, however, the D.C. Circuit held that symbols used to refer to FBI informants "plainly fall within the ambit of Exemption 2." 636 F.2d at 485. The public has no legitimate interest in this administrative information.

EXEMPTION (b)(3)

This provision allows an agency to delete information specifically exempted from disclosure by statute. The CIA and FBI deleted information exempted by 50 U.S.C. §§ 403(d)(3) and 403g (1976), which provide that the Director of the CIA is responsible for protecting in-

telligence sources and methods from unauthorized disclosure. This court has held such information properly exempted. In *National Commission on Law Enforcement and Social Justice v. CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978), the court affirmed summary judgment for the CIA, holding that information withheld under 50 U.S.C. §§ 403(d)(3) and 403g (1976) is within the ambit of exemption (b)(3).

Appellants argue the affidavits present conclusory statements and do not show that release of exempted information could reasonably be expected to identify intelligence sources or methods. Here, the affidavits contain enough information from which the court can conclude that release could reasonably be expected to reveal protected sources or methods.

EXEMPTION (b)(5)

The Cohens' brief sets forth no reasons to believe that the exemption was misapplied.

EXEMPTION (b)(6)

The CIA applied exemption (b)(6) to withhold personal information about third persons concerning political philosophies, beliefs, travels, affiliations, "and other activities which such individuals would not suspect would be placed in the public domain due to the embarrassing or controversial nature of the information." The State Department deleted records which report third party violations of federal statutes and regulations.

Appellants argue the withheld information is not the kind of confidential personal data usually included in a personnel file. However, the Supreme Court has recently declared that "similar files" excludible under exemption (b)(6) has a broad meaning. *United States Depart-*

ment of State v. Washington Post Co., 102 S. Ct. 1957, 1960 (1982). In *Washington Post*, the State Department withheld information relating to the citizenship status of third parties. The Court upheld the Department's use of exemption (b)(6). Here, the exemption was properly applied.

EXEMPTION (b)(7)(C)

The Army invoked this exemption to delete biographical data about particular people whose names it released to appellants. The FBI deleted names and identifying data of third parties who were targets of FBI investigations. It withheld highly personal, defamatory or embarrassing information about third persons. It also withheld the identities of FBI agents and other investigatory sources.

The statute does not provide for a blanket exemption for the names of all personnel, but protection in this case is warranted. *See Lesar*, 636 F.2d at 487-88; *see also Lamont*, 475 F. Supp. at 777. The agencies have declared that disclosure of withheld data would be an invasion of privacy. They also declared the information is not relevant to appellants' request.

EXEMPTION (b)(7)(E)

This exemption allows an agency to withhold records which disclose investigative techniques and procedures. The FBI deleted information which would disclose a lawful investigative technique for conducting telephone interviews. The exemption was used only to protect the technique; the information gathered thereby was released.

UNIDENTIFIED RECORDS

Appellants' contention that the agencies failed to release a number of unidentified records is without merit. Agencies may lawfully refer those requesting documents to the agencies of origin. The affidavits demonstrate that the agencies made a good faith effort to comply with the Cohens' requests. The FBI was not required to make an all-encompassing search of the records of every field office. *United States v. Marks*, 578 F.2d 261, 263 (9th Cir. 1978). Appellants give no examples to support their claim that additional documents were never disclosed.

PRIVACY ACT CLAIMS

Finally, appellants raise no specific arguments on the Privacy Act claims. The district court properly granted summary judgment on both the FOIA and Privacy Act claims.

PROCEDURAL MATTERS

The district court did not abuse its discretion in procedural rulings challenged by the Cohens. Appellants were bound by the stipulation entered into by their counsel. They voluntarily chose their attorney and are bound by his acts. *Link v. Wabash Railroad*, 370 U.S. 626, 635-36 (1962). This is not a situation where the attorney settled a case without the client's permission.

Although a request for leave to amend a complaint generally should be viewed liberally, it was not an abuse of discretion for the district court to deny leave to amend where the Cohens were trying to revive a claim which was already dead. The federal defendants had been dismissed in both their individual and official capacities. All but one state defendant were dismissed for lack of

service of process. Appellants admitted they were attempting to reintroduce parties already dismissed by stipulation. They cannot amend their complaint to avoid the effects of prior rulings which vitiated their first cause of action. *See Mends v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 131 (9th Cir. 1982); *Giesenkamp v. Nationwide Mutual Insurance Co.*, 71 F.R.D. 1, 4 (N.D. Cal. 1974), *aff'd per curiam*, 540 F.2d 458 (9th Cir. 1976).

Nor was it an abuse of discretion for the court to deny an extension or reopening of discovery. The court found that appellants knew that their former counsel was hesitant to proceed with the case long before the discovery cut-off date had passed. Again, the litigants are bound by the conduct of their attorney. *Cf. Kung v. FOM Investment Corp.*, 563 F.2d 1316, 1318 (9th Cir. 1977).

SOVEREIGN IMMUNITY

The Federal Tort Claims Act waives the United States government's sovereign immunity only when complainants meet the Act's requirement that they present their claims against federal defendants to the appropriate federal agency. 28 U.S.C. § 2675(a)(1976). Appellants failed to comply with the Act. The district court properly dismissed appellants' claims as against the United States on the ground of sovereign immunity.

The Cohens argue that Carter and unknown agents have not been dismissed from the case. The court entered an order dismissing the entire action on February 11, 1981. That order included the dismissal of defendants Carter and unknown agents. The judgment is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-5365

D.C. No CV 77-3449 MML

ROBERT CARL COHEN AND HELENE KONIDARE COHEN, PLAINTIFFS/APPELLANTS

v.

WILLIAM FRENCH SMITH, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS/APPELLEES

FILED JULY 5, 1983

Before: GOODWIN, HUG, and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

/s/Robert Boochever

/s/

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-77-3449-MML

ROBERT CARL COHEN, ET AL., PLAINTIFFS

v.

GRIFFIN BELL, ET AL., DEFENDANTS

[Filed Aug. 6, 1979]

Plaintiffs in this action have moved the Court to reopen the case following the dismissal filed on April 17, 1979; to reopen discovery; to certify for appeal under 28 U.S.C. §1292(b) the dismissal of damage claims against the federal defendants; and to amend the complaint.

The action was dismissed on April 17, 1979 on the ground that it was settled or in the process of being settled. As it appears that no settlement was in fact achieved, and that plaintiffs have made a timely motion to reopen the case, the dismissal of April 17, 1979 shall be withdrawn, and the matter shall be placed on the Court's calendar of active cases.

The motion to reopen discovery is denied. The parties have had ample time to conduct discovery in this case. From an examination of the file and the affidavits submitted by the parties, the Court concludes that plain-

tiffs knew of their former counsel's hesitancy to proceed with the case long before the discovery cut-off date had passed. Plaintiffs have not shown any reason to reopen discovery which outweighs the prejudice to the defendants in doing so after the passage of a significant period of time.

Plaintiffs' motion to certify for appeal the dismissal of the damage claims against the federal defendants is also denied. Plaintiffs' present counsel has conceded that all damage claims against the individual federal defendants in other than their representative capacities were dismissed in July, 1978 pursuant to stipulation of counsel. That stipulation was made on the assumption that the named federal officials had not individually undertaken any acts alleged in the complaint, but were sued solely because they headed an agency alleged to be liable for damages. The decision of the Court to dismiss the remaining damage claims in the first and third causes of action, because those claims were in fact against the United States and no administrative claim had been filed, does not present a controlling issue of law as to which there is substantial ground for difference of opinion, nor will an immediate appeal materially advance the ultimate termination of the litigation. 28 U.S.C. §1292(b).

The plaintiffs' request for leave of Court to file an amended complaint is likewise denied. Certain of the claims plaintiffs seek to add have already been dismissed by stipulation of the parties. The other proposed amendments, listed at pages 5 through 13 of the plaintiffs' Request for Leave of Court to Amend Complaint, filed June 20, 1979, substantially expand the scope of the litigation as it now exists. Plaintiffs have unduly delayed in seeking amendment, and the defendants will be unduly prejudiced by the amendment of the complaint at this late date in the proceeding.

On March 13, 1978, the plaintiffs were ordered to serve

all state defendants within fifteen days. As of March 13, 1978, plaintiffs had only served Edward Carter as one of the Regents of the University of California. As it does not appear that the remaining persons alleged to be Regents of the University of California were ever served, those persons shall be dismissed from this litigation.

The Pretrial Conference in this case, previously scheduled for April 16, 1979, shall be held at 10:00 A.M. on October 8, 1979 in Courtroom 12 of the United States Courthouse, 312 North Spring Street, Los Angeles, California. The parties shall prepare their Pretrial Memoranda and a Pretrial Conference Order in accordance with Fed.R.Civ.P. 16, Local Rule 9, and the special requirements of this Court as set forth in the attached Notice of Pretrial Conference and Additional Requirements for Memoranda of Contentions of Fact and Law and for Pretrial Conference Order.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, counsel of record for all parties in this matter.

Dated: August 6, 1979

/s/ Malcolm M. Lucas
/s/

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77-3449-MML

ROBERT CARL COHEN, ET AL., PLAINTIFFS

v.

GRIFFIN BELL, ET AL., DEFENDANTS

[Filed Oct. 1, 1979]

Counsel are present and motions are argued to the Court. The Plaintiffs' motion for justification under Vaughn v. Rosen is granted and the Government is to file its indexes by January 21, 1980.

The plaintiffs' motions for reconsideration of request for leave to amend the complaint, to reopen discovery for withdrawal of the stipulation dismissing individual Federal defendants, and of dismissal of the damage actions are all denied.

The Pre-Trial Conference is continued from October 15, 1979 to February 25, 1980 at 10:00 A.M.

/s/Malcolm M. Lucas
/s/

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-77-3449-MML

ROBERT CARL COHEN, ET AL., PLAINTIFFS

v.

GRIFFIN B. BELL, ET AL., DEFENDANTS

[ENTERED JUNE 4, 1980]

FINDINGS OF FACT

1. Plaintiffs are two individuals, one of whom is Robert Carl Cohen. Plaintiffs allege that in 1975 and early 1976, Robert Carl Cohen made requests to the Federal Bureau of Investigation (the "FBI"), the Justice Department (i.e., all Justice Department components other than the FBI), the Central Intelligence Agency (the "CIA"), the State Department, the Postal Service, the Department of the Army (the "Army") and the Internal Revenue Service (the "IRS") for all records and documents pertaining to himself in their possession.

2. Plaintiffs allege that the above agencies wrongfully failed to disclose certain documents to Mr. Cohen.

3. Plaintiffs allege that, by failing to disclose those documents, the above agencies violated 5 U.S.C.

§§552(a)(3) and 552a(d)(1), the respective provisions of the Freedom of Information Act (the "FOIA") and of the Privacy Act which mandate such disclosure.

4. Plaintiffs also claim that the above agencies have violated the following provisions of the Privacy Act, which deal with agency practices and procedures in compiling and maintaining records: 5 U.S.C. §§ 552a(e)(5), (6), (7), (1) and (2); 5 U.S.C. §551a(c)(3); and 5 U.S.C. §552a(d)(2).

5. Although the named Federal Defendants include the Secretary of Defense, the Secretary of the Treasury and the Director of the Secret Service, plaintiffs do not allege that the Defense Department, the Treasury or the Secret Service have violated any provision of the FOIA or the Privacy Act.

6. The IRS and Postal Service have released materials responsive to Mr. Cohen's FOIA requests.

7. The IRS and Postal Service, in releasing those materials, have not withheld any portion of them pursuant to the FOIA's exemption provisions. However, the IRS and Postal Service have withheld portions of certain computer printouts that deal with third parties on the ground that they do not come within the scope of Mr. Cohen's requests.

8. Although Mr. Cohen claims to have made a request to the Justice Department for records pertaining to himself, he never presented any such request to the manager of the system of records to which he sought access.

9. The Justice Department advised Mr. Cohen through a letter of December 2, 1975 that such a request must be presented to the manager of the system of records to which he sought access, gave him a list of the Justice Department component units from which he could obtain records, and advised him how he could obtain the names of Justice Department records systems

and records managers.

10. Mr. Cohen never took an administrative appeal from any denial of any request for documents which he may have made to the Justice Department.

11. The FBI, CIA, State Department and Army, have located, retrieved and released documents responsive to Mr. Cohen's FOIA requests.

12. The FBI, CIA, State Department and Army have withheld some or all of certain documents pursuant to the following FOIA exemptions: (b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E) (5 U.S.C. §552(b)(1)-(3), (5), (6), (7)(C)-(E)).

13. Officials of the FBI, CIA, State Department and Army have submitted affidavits that itemize, index and justify the withholdings those agencies have made of materials responsive to Mr. Cohen's FOIA requests.

14. FOIA exemption (b)(1) has been invoked by the FBI, CIA, and Army to withhold from Mr. Cohen certain materials that have been properly classified pursuant to Executive Order 12065.

15. FOIA exemption (b)(2) has been invoked by the FBI to withhold from Mr. Cohen the symbol numbers it has assigned to certain individuals who have supplied it with certain information and certain other data which would identify such informants.

16. FOIA exemption (b)(2) has also been invoked by the State Department in support of its deletion of certain material that, it believes, consisted of classification or administrative information.

17. No unredacted copies exist of the documents containing the State Department's (b)(2) deletions.

18. Mr. Cohen never took an administrative appeal with respect to the deleted portions of any documents released to him by the State Department.

19. FOIA exemption (b)(3) has been invoked by both the CIA and the FBI to delete certain materials pursuant

to 50 U.S.C. §§403(d)(3) and 403g.

20. The material deleted by the FBI pursuant to exemption (b)(3) consists of the names of one or more CIA employees.

21. The material deleted by the CIA under exemption (b)(3) includes, among other things, information that reveals the identity of a source of intelligence, information that reveals the methods by which intelligence has been secured and information that consists of CIA employee names, official titles and organizational data.

22. FOIA exemption (b)(5) has been invoked by the FBI to withhold certain materials that were compiled in connection with this litigation and that are subject to the protection of the work-product doctrine.

23. FOIA exemption (b)(6) has been invoked by the CIA and State Department to delete from the materials released to Mr. Cohen information concerning other individuals.

24. The material deleted by the CIA pursuant to exemption (b)(6) includes data about the political philosophies, beliefs and associations of certain third parties; their travels; and associations, including their personal and confidential relationships.

25. The material deleted by the State Department under exemption (b)(6) depicts certain third parties in a derogatory light in that it reports their contravention of statutory and regulatory requirements of the United States Government.

26. Mr. Cohen has never suggested that he is interested in documents or portions of documents that pertain to third parties, nor has he suggested that the public interest will be served if he is permitted to obtain the materials withheld by the CIA and State Department pursuant to exemption (b)(6).

27. FOIA exemption (b)(7)(C) has been invoked by the FBI and the Army to delete from the materials releas-

ed to Mr. Cohen information concerning third parties.

28. FOIA exemption (b)(7)(C) has also been invoked by the FBI to delete from the materials released to Mr. Cohen the identities of third parties it has interviewed and personal information about them, including symbol numbers assigned to certain of them.

29. FOIA exemption (b)(7)(C) has further been invoked by the FBI to delete from the materials released to Mr. Cohen the identities of the FBI personnel responsible for the investigative activities recorded therein, the identities of other FBI personnel, and the identities of certain personnel from other government agencies.

30. With respect to material that the FBI has deleted pursuant to exemption (b)(7)(C) and that reveals the identities of third parties it has interviewed, the public interest favors the withholding of such material rather than its disclosure, because disclosure may lead to a diminution of the public's willingness to supply information to the FBI.

31. Mr. Cohen has never suggested that he is interested in documents or portions of documents that pertain to third parties, nor has he suggested that the public interest will be served if he is permitted to obtain the materials withheld by the FBI and Army pursuant to exemption (b)(7)(C).

32. FOIA exemption (b)(7)(D) has been invoked by the FBI and the Army to delete from the materials released to Mr. Cohen the identities of individuals who supplied information under either express or implied assurances of confidentiality. The deleted material includes the symbol numbers the FBI has given certain informers.

33. FOIA exemption (b)(7)(D) has been similarly invoked by the State Department to delete the name of an individual who supplied information to the FBI.

34. FOIA exemption (b)(7)(E) has been invoked by the

FBI to delete from the materials released to Mr. Cohen information that would disclose a lawful investigative technique for conducting interviews and telephone calls.

35. Each deletion the FBI, CIA, State Department, Postal Service, Army and IRS has made in the materials released to Mr. Cophen is lawful and proper under the Privacy Act.

36. Some or all of the deletions each such agency has made consisted of materials that pertain to persons other than Mr. Cohen.

37. Some of the deletions the FBI, CIA and Army have made consist of materials that are subject to FOIA exemption (b)(1).

38. Some of the deletions the FBI and CIA have made are of materials exempted from release to the public by 50 U.S.C. §40(d) (3) and 403g.

39. The FBI records at issue are investigatory materials compiled for law enforcement purposes.

40. One of the State Departments' deletions appears in a Security or Passport Record and identifies a confidential informant.

41. The Army records at issue are part of the United States Army Intelligence Agency ("USAINTA") Investigative Files System and were created in the course of lawful national security investigations of Mr. Cohen.

42. The Postal Service records at issue are mail cover records.

43. Plaintiffs have not identified a single adverse determination that the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS have made about Mr. Cohen, nor have they identified a single agency record that is so inaccurate, irrelevant, untimely or incomplete as to cause any such determination to be unfair.

44. Plaintiffs have not identified any disclosure of any record about Mr. Cohen that the FBI, Justice

Department, CIA, State Department, Postal Service, Army or CIA have made at any time since September 27, 1975, the effective date of the Privacy Act.

45. Plaintiffs have not identified a single agency record that describes how Mr. Cohen has exercised his First Amendment rights, the maintenance of which is not pertinent to or within the scope of an authorized law enforcement activity.

46. Plaintiffs have not identified any information collected by the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS afer the effective date of the Privacy Act, that was collected from a third party, ought to have been collected from Mr. Cohen, and could have an adverse effect on any agency's determinations about Mr. Cohen's rights, benefits and privileges under any federal program.

47. Plaintiffs do not identify any record or portion of a record which ought to be removed from the files of the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS as irrelevant to and unnecessary for the accomplishment of any such agency's purposes.

48. Plaintiffs do not allege that Mr. Cohen ever asked the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS to make available to him their accountings of the disclosures they had made, if any, of agency records pertaining to Mr. Cohen.

49. Plaintiffs do not allege that Mr. Cohen ever asked any agency to amend any agency record pertaining to him.

50. No genuine issue of material fact exists as to the third claim for relief against the federal defendants.

CONCLUSIONS OF LAW

1. The IRS and Postal Service have retrieved and

released to Mr. Cohen materials responsive to his FOIA request.

2. In so doing, the IRS and Postal Service have not withheld any materials under any of the FOIA's exemption provisions.

3. The IRS and Postal Service have not violated the FOIA.

4. Because he did not present his request for Justice Department records to the manager of the particular system of records to which he sought access, Mr. Cohen did not comply with 28 C.F.R. §16.41 and, pursuant to 5 U.S.C. §(a)(3)(B), the Justice Department was not required to comply with his request.

5. Mr. Cohen's failure to comply with 28 C.F.R. §16.41(a) and his failure to take an administrative appeal with respect to his request for Justice Department records constituted a failure to exhaust his administrative remedies.

6. Because Mr. Cohen never exhausted his administrative remedies with respect to his request to the Justice Department, this Court cannot grant relief under the FOIA.

7. In withholding matters that are properly classified under Executive Order 12065, the Army, CIA and FBI have properly invoked exemption (b)(1).

8. The symbol numbers that the FBI assigns to its informers are properly withheld under exemption (b)(2).

9. In withholding such symbol numbers pursuant to exemption (b)(2), the FBI has properly invoked exemption (b)(2).

10. Administrative markings on documents are properly withheld under exemption (b)(2).

11. In withholding what it believes to have been certain classification or administrative information (*e.g.*, routing information), the State Department has properly invoked exemption (b)(2).

12. Because no unredacted copies exist of the documents containing the deletions the State Department made pursuant to exemption (b)(2), any dispute concerning such deletions is moot.

13. Because Mr. Cohen never took an administrative appeal with respect to the deleted portions of documents released to him by the State Department, Mr. Cohen never exhausted his administrative remedies and this Court cannot grant any relief.

14. Pursuant to FOIA exemption (b)(3), matters are exempt from release if certain statutes, other than the FOIA, so exempt them.

15. 50 U.S.C. §§403(d)(3) and 403g are two statutes that exempt certain information from release under the FOIA and are therefore statutes to which FOIA exemption (b)(3) applies.

16. In withholding matters that come within the scope of 50 U.S.C. §403(d)(3) and 403g, the FBI and CIA properly invoked exemption (b)(3).

17. The work-product doctrine is a proper basis for the deletion of material under exemption (b)(5).

18. In withholding materials that were compiled in connection with this litigation and that are subject to the protection of the work-product doctrine, the FBI properly invoked exemption (b)(5).

19. In determining whether particular material comes within the scope of exemption (b)(6), this Court must balance the interests of the public in obtaining disclosure of the material against the subject individuals' privacy interests.

20. If the material withheld by the CIA and State Department pursuant to exemption (b)(6) is released, such release will violate the privacy interests of third parties, in that it will disclose information concerning their political philosophies, beliefs and associations; their travels; their personal and confidential relationships; and

their possible violation of federal statutes and regulations.

21. Because Mr. Cohen has not suggested that the public interest will be served if he is permitted to obtain the materials withheld by the CIA and State Department pursuant to exemption (b)(6), the individuals' privacy interests in the non-disclosure of such materials must prevail over the public interest in their disclosure.

22. The CIA and State Department thus have properly invoked exemption (b)(6).

23. An agency may not withhold material under exemption (b)(7)(C) unless the public's interest in the disclosure of such information is outweighed by the subject individual's interest in non-disclosure.

24. If the material withheld by the Army and FBI pursuant to exemption (b)(7)(C) is released, it will violate the privacy interests of the subject individuals in that will disclose (a) that they are discussed in Army or FBI investigative records, (b) that they have been informants for the FBI or (c) that they are FBI or other government personnel who have been involved in FBI investigatory activities.

25. Because Mr. Cohen has not suggested that the public interest will be served if he is permitted to obtain the materials withheld by the FBI and Army pursuant to exemption (b)(7)(C), those individuals' privacy interests in the non-disclosure of such materials must prevail over the public interest in their disclosure.

26. Moreover, with respect to material deleted by the FBI under exemption (b)(7)(C) that reveals the identities of third parties whom the FBI has interviewed, the public interest favors the withholding of such material to safeguard the public's willingness to supply information to the FBI.

27. The FBI and Army have properly invoked exemption (b)(7)(C).

28. In withholding material that would identify individuals who have supplied information to the FBI or the Army under express or implied assurances of confidentiality, the FBI, Army and State Department properly invoked exemption (b)(7)(D).

29. In withholding material that would disclose a lawful investigative technique for conducting interviews and telephone calls, the FBI properly invoked exemption (b)(7)(E).

30. 5 U.S.C. §552a(d)(1) requires every federal agency, upon request, to grant to individuals access to information or records about themselves.

31. Because Mr. Cohen's request to the Justice Department for records concerning himself did not comply with the requirements of 28 C.F.R. §16.41(a), he never made a request that obligated the Justice Department to comply with 5 U.S.C. §552a(d)(1).

32. Although the FBI has deleted certain materials from the records released to Mr. Cohen, such deletions do not constitute violations of 5 U.S.C. §552a(d)(1).

33. Because the records containing such deletions are investigatory materials compiled for law enforcement purposes, they are exempted by 5 U.S.C. §552a(k)(2) and 28 C.F.R. §16.96(a)(1) from release under 5 U.S.C. §552a(d)(1).

34. Moreover, to the extent that such deleted materials are subject to FOIA exemption (b)(1), they are exempted by 5 U.S.C. §552a(k)(1) and 28 C.F.R. §16.96(a)(1) from release under 5 U.S.C. §552a(d)(1).

35. Further, to the extent that such deleted materials do not relate to Mr. Cohen, they do not come within 5 U.S.C. §552(a)(d)(1) because that statute requires only that an agency grant an individual access to records about himself.

36. Although the CIA has deleted certain materials from the records released to Mr. Cohen, such deletions

do not constitute violations of 5 U.S.C. §552a(d)(1).

37. To the extent that such deleted materials do not relate to Mr. Cohen, they do not come within 5 U.S.C. §552a(d)(1).

38. To the extent that such deleted materials are subject FOIA exemption (b)(1), they are exempted by 5 U.S.C. §552a(k)(1) and 32 C.F.R. §19011.71(a)(1) from release under 5 U.S.C. §552a(d)(1).

39. To the extent that such deleted materials are subject to 50 U.S.C. §403(d)(3), they are exempted by 5 U.S.C. §552a(j)(1) and 32 C.F.R. §1901.61(d) from release under 5 U.S.C. §552a(d)(1).

40. To the extent that such deleted materials are subject to 50 U.S.C. §403g, they are exempted from release under 5 U.S.C. §552a(d)(1).

41. Although the State Department has deleted certain materials from the records released to Mr. Cohen, such deletions do not constitute violations of 5 U.S.C. §552a(d)(1).

42. To the extent that such deleted materials do not relate to Mr. Cohen, they do not come within 5 U.S.C. §552a(d)(1).

43. The deleted material that appears in a State Department Security or Passport Record and identifies a confidential informant is exempted by 5 U.S.C. §552a(k)(2) and 22 C.F.R. §6a.6(j)(2) from release under 5 U.S.C. §552a(d)(1).

44. To the extent that those deleted materials appear in State Department records that have been destroyed pursuant to routine record destruction procedures, they cannot now be released and any claim under 5 U.S.C. §552a(d)(1) with respect to them is therefore moot.

45. Although the Postal Service and IRS have deleted certain materials from the records released to Mr. Cohen, such deletions do not constitute violations of 5 U.S.C. §552a(d)(1).

46. Such deleted materials do not relate to Mr. Cohen and, therefore, do not come within 5 U.S.C. §552a(d)(1).

47. Although the Army has deleted certain materials from the records released to Mr. Cohen, such deletions do not constitute violations of 5 U.S.C. §551a(d)(1).

48. Because the records containing such deletions are part of the USAINTA Investigative Files System and were created in the course of lawful national security investigations of Mr. Cohen, they are exempted from release under 5 U.S.C. §552a(d)(1) by 5 U.S.C. §552a(k)(2) and AO502.10a DAMI, *reproduced at* 32 C.F.R. §505.9.

49. Moreover, to the extent that such deleted materials do not relate to Mr. Cohen, they do not come within 5 U.S.C. §552a(d)(1).

50. Because plaintiffs have neither identified a single adverse determination that the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS have made with respect to Mr. Cohen nor identified a single agency record that was so inaccurate, irrelevant, untimely or incomplete as to cause any such determination to be unfair, they have failed to state a claim as to any agency's violation of 5 U.S.C. §552a(e)(5).

51. Pursuant to 5 U.S.C. §552a(k)(2), 28 C.F.R. 16.96(a)(1) and 39 C.F.R. §266.9, the FBI and Postal Service records at issue herein are exempt from the provisions of 5 U.S.C. §551a(e)(5).

52. By its terms, 5 U.S.C. §552a(e)(6) cannot apply to disclosure of records unless they occurred after September 27, 1975, the effective date of the Privacy Act.

53. The complaint does not allege that on or after September 27, 1975, the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS made any disclosure of records pertaining to Mr. Cohen to anyone outside the federal government.

54. Plaintiffs fail to state a claim as to any such agen-

cy's violation of 5 U.S.C. §552a(e)(6).

55. 5 U.S.C. §552a(e)(7) prohibits agencies from maintaining records that describe how individuals exercise their First Amendment rights unless the maintenance of such records, among other things, is expressly permitted by statute or "pertinent to and within the scope of an authorized law enforcement activity."

56. Because plaintiffs do not identify any agency records that are claimed to contravene 5 U.S.C. §552a(e)(7), they do not state a claim as to any agency's violation of it.

57. Because plaintiffs have not identified any information collected by the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS that (1) was collected after the effective date of the Privacy Act, (2) was collected from a third party, (3) ought to have been collected from Mr. Cohen, and (4) could have an adverse effect on any agency's determinations about Mr. Cohen's rights, benefits, privileges under any federal program, they do not state a claim as to any agency's violation of 5 U.S.C. §552a(e)(2).

58. Moreover, neither the FBI nor the Postal Service violated 5 U.S.C. §552a(e)(2) because the records of those agencies at issue here are exempted from the provisions of 5 U.S.C. §552a(e)(2) by U.S.C. §552a(k)(2), 28 C.F.R. §16.96(a)(1) and 39 C.F.R. §266.9(b)(2).

59. Because plaintiffs have not identified any record or portion of a record that ought to be removed from the files of the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS because it is irrelevant to and unnecessary for the accomplishment of any such agency's purposes, they do not state a claim as to any agency's violation of 5 U.S.C. §552a(e)(1).

60. Moreover, pursuant to 5 U.S.C. §552a(k)(2), 28 C.F.R. §16.96(a)(1) and 39 C.F.R. §266.9, the FBI and Postal Service records at issue here are exempt from the

provisions of 5 U.S.C. §552a(e)(1).

61. 5 U.S.C. §552a(c)(1) requires agencies to keep accurate accountings of the dates, natures and purposes of certain of their disclosures of records and to note, in such accountings, the names and addresses of each person or agency to whom such disclosures are made.

62. 5 U.S.C. §552a(c)(3) requires such agencies to make those accountings available upon request to the persons named in the records.

63. Because plaintiffs do not allege that Mr. Cohen ever requested the FBI, Justice Department, CIA, State Department, Postal Service, Army or IRS to make any such accountings available to him, they do not state a claim as to any agency's violation of 5 U.S.C. §552a(c)(3).

64. Moreover, pursuant to 5 U.S.C. §552a(k)(2), 28 C.F.R. §16.96(a)(1) and 39 C.F.R. §266.9, the FBI and Postal Service records here at issue are exempt from the provisions of 5 U.S.C. §552a(c)(3).

65. In addition, pursuant to 5 U.S.C. §551(j)(1) and 32 C.F.R. §1901.61(b), the CIA records at issue here are exempt from the provisions of 5 U.S.C. §552a(c)(3).

66. 5 U.S.C. §552a(d)(2) permits an individual to request the amendment of agency records pertaining to him and directs the agency possessing such records either to make the requested amendment or to advise the individual why it declines to do so.

67. Because plaintiffs have not alleged that Mr. Cohen ever asked any agency to amend any record pertaining to him, they fail to state a claim that any agency has violated 5 U.S.C. §552a(d)(2).

68. Moreover, pursuant to 5 U.S.C. §552a(k)(1) and (2); 28 C.F.R. §16.96(a)(1); 32 C.F.R. §1901.71(a)(1) and (2); 22 C.F.R. §6a.6(j)(2); 39 C.F.R. §266.9(b)(1); and A 0502.10a DAMI, *reproduced at* 32 C.F.R. §505.9, some or all of the FBI, CIA, State Department, Postal Service and Army records at issue here are exempt from the

provisions of 5 U.S.C. §552a(d)(2).

69. The moving federal defendants are entitled to judgment as a matter of law on plaintiffs' third claim for relief.

Dated: June 3, 1980.

/s/Malcolm M. Lucas
/s/

APPENDIX F

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77-3449-MML

ROBERT CARL COHEN, ET AL., PLAINTIFF

v.

GRIFFIN BELL, ET AL., DEFENDANTS

[Entered June 4, 1980]

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to the Findings of Fact and Conclusions of Law filed concurrently herewith, that Judgment, with prejudice and without costs, be, and the same is, entered in favor of the Federal Defendants (i.e., all defendants herein other than Edward W. Carter), with respect to all portions of the complaint which claim that any federal agency has violated any provision of the Freedom of Information Act, 5 U.S.C. section 552, or of the Privacy Act, 5 U.S.C. section 552a.

Dated: This 21 day of May, 1980.

/s/Malcolm M. Lucas
/s/

APPENDIX G

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. section 552, provides, in pertinent part, as follows:

(a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon . . . request, . . . shall make the records promptly available to any person.

(b) This section does not apply to matters that are

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign polic · and (B) are in fact properly classified pursuant to st .h Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 U.S.C. section 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

. . .

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case

of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

. . .

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

(a) Amendments. Any party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

CERTIFICATE OF SERVICE

I, Lawrence Teeter, hereby declare under penalty of perjury that on September 2, 1983, I mailed 3 copies of the attached Petition to opposing counsel addressed as follows:

Leonard Schaitman, Esq.
Marilyn Urwitz, Esq.
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington D.C. 20530

John Bower, Esq.
3200 Wilshire Blvd.
South Tower
Los Angeles, California 90010

EXECUTED this 2nd day of September, 1983, at Los Angeles, California.

_____

LAWRENCE TEETER